No. 80-553

In the Supreme Court of the United States

OCTOBER TERM, 1980

RONALD DEMANETT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that Coast Guard officials lacked reasonable suspicion to justify stopping and boarding their vessel and that evidence of some 21,000 pounds of marijuana found on board should have been suppressed.

1. Petitioners were indicted in the United States District Court for the District of New Jersey on charges of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count 1), conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 2), importation of marijuana, in violation of 21 U.S.C. 960(a)(1) (Count 3), and possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) (Count 4).

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*Co-petitioners are Charles Gombrewicz, Pennell O'Dell, Jr., Clemente Castillo-Yepes, and Ernesto Guerrero-Chaguay.

Following the denial of their suppression motion, petitioners Demanett, O'Dell, and Gombrewicz entered conditional guilty pleas to Count 1, reserving the right to appeal the denial of their suppression motion. Each was sentenced to four years' imprisonment; Counts 2, 3 and 4 were dismissed. Petitioners Guerrero-Chaguay and Castillo-Yepes were convicted after a jury trial on all four counts. They were each sentenced to six month's imprisonment on Counts 1 and 2 and to concurrent five-year terms of probation on Counts 3 and 4.

2. The facts showed that on March 21, 1979, the Coast Guard Cutter POINT FRANKLIN was patrolling the Southern New Jersey coast (I H. Tr. 4-5).[1] At 4:30 p.m., at a point about five miles outside Delaware Bay, the cutter's commander, Lt. John H. Olthuis, observed a 70-foot commercial fishing boat heading into Delaware Bay at a speed of 2-3 knots. The boat bore the name KRISTEN JANE, with its home port marked as Charleston, South Carolina (I H. Tr. 19-22). Lt. Olthuis noted that the boat was rigged with fishing gear that was uncharacteristic for that area. He also saw that the deck was clean, the trawl doors were lashed in place, and the trawling gear did not appear to have been used for some time (I H. Tr. 22-27). From his experience Lt. Olthuis thought that the vessel's speed was unusually slow for a fishing boat returning to port with a catch of fish. It was also unusual to see a fishing vessel in that area heading into Delaware Bay, where there are very few facilities for the commercial processing of fish (I H. Tr. 28).

Olthuis reported his observations to the Coast Guard station at Cape May, New Jersey, and shortly afterward radioed a request to Cape May for a computer check on the KRISTEN JANE to determine whether the vessel was known or suspected of being used by drug smugglers (I H.

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[1] "H. Tr." refers to the transcript of the suppression hearing in the district court.

Tr. 28-29). The computer check on the KRISTEN JANE was negative, but, as Olthuis indicated in his radio conversation to the Cape May station, he was still suspicious and decided to board the KRISTEN JANE (I H. Tr. 37-39; Pet. App. 5a-6a).

Olthuis radioed the KRISTEN JANE that he was a Coast Guard officer and intended to board their vessel, and he ordered those in charge of the vessel to proceed into the calmer waters of Delaware Bay (I H. Tr. 41, 43). As the POINT FRANKLIN approached the KRISTEN JANE for boarding, Petty Officer Cornell noticed that the name and home port of the KRISTEN JANE were not permanently marked on the vessel, but were printed on a placard hung over the stern (I H. Tr. 173).

Petty Officers Strickland and Cornell then boarded the KRISTEN JANE and explained to petitioners Demanett and O'Dell that they had boarded to inspect for compliance with applicable federal laws (I H. Tr. 176). Strickland asked to see the KRISTEN JANE's documentation papers. When he was informed that they were not on board, Strickland told O'Dell that he would have to enter the hold to look for the documentation number imprinted on the main beam (I H. Tr. 177-180). When O'Dell removed the hatch cover, Strickland immediately saw that a substantial amount of marijuana almost filled the hold (I H. Tr. 179-181).

3. The district court upheld the boarding and search as a reasonably limited investigation in light of the nature of the vessel and its activities (June 14, 1979 Tr. 20). The court of appeals affirmed (Pet. App. 1a-17a; 629 F. 2d 862), holding that at the time of the boarding the Coast Guard officers had an articulable and reasonable suspicion of a documentation violation, and that therefore they were justified in making a limited inspection of the vessel for purposes of

document verification. Because the contraband was found in plain view in the course of this limited inspection, the court found no Fourth Amendment violation (Pet. App. 17a).

4. Petitioners argue that the facts of this case are indistinguishable from those in *Brown* v. *Texas*, 443 U.S. 47 (1979), in which the Court held that the detention of the defendant violated the Fourth Amendment because the officers had no reasonable suspicion that the defendant was involved in criminal conduct. Accordingly, petitioners contend that the court of appeals erred in concluding that the boarding of the KRISTEN JANE was based on reasonable suspicion. Petitioners' reliance on *Brown* is misplaced. Here, unlike in *Brown*, there was no arbitrary seizure; instead, as the court of appeals correctly concluded, the seizure of petitioners' vessel was based on specific and objective facts that provided reason to suspect that the vessel was engaged in activity for which it was not properly documented. Further review of the fact-bound conclusion of the courts below is unwarranted.[2]

The Coast Guard officer's observations—a commercial fishing vessel far from its home port, heading into a port not normally used by commercial fishermen, traveling at an

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[2]Under 14 U.S.C. 89(a) the Coast Guard has the authority to board vessels at sea and to inspect for compliance with documentation laws. This Court has recently declined, on several occasions, to review claims that the Fourth Amendment was violated by warrantless and suspicionless boardings of vessels on the high seas by Coast Guard officers checking for compliance with documentation and safety requirements under the authority of Section 89(a). As the court of appeals noted (Pet. App. 17a & n.4), however, the question whether Section 89(a) legitimately authorizes the Coast Guard to board and search in the absence of either probable cause or reasonable suspicion of violations need not be decided in this case.

unusually slow speed, and carrying fishing gear that was both unusual for the area and not in recent use—were sufficient to give rise to an articulable and reasonable suspicion that, at the least, the ship's captain had violated the documentation laws, if not other criminal laws as well. And once the Coast Guard cutter had approached the fishing boat for boarding, the impermanent nature of the boat's markings gave the officers probable cause to believe that a violation of documentation laws was occurring (see 46 U.S.C. 46). Petitioners do not allege that the conduct of the search was more intrusive than was reasonably necessary to accomplish the limited purpose of a documentation verification,[3] nor do they dispute that the evidence of contraband came into plain view in the course of the limited search that was conducted. In these circumstances, the boarding and search were reasonable under the Fourth Amendment.

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[3]Petitioners do claim (Pet. 7 n.10) that the boarding and registration inspection was really a pretextual search for evidence of crime. Both the district court and the court of appeals rejected the argument that the evidence in this case should be suppressed for that reason, because both courts concluded that the documentation verification purpose sufficed to justify the boarding and that any other purpose was therefore irrelevant (Pet. App. 15a).

In any case, there is no merit to this argument. In *Scott* v. *United States*, 436 U.S. 128, 137 (1978), this Court concluded that the existence of an alleged Fourth Amendment violation turns on "an objective assessment of [the] officer's actions in light of the facts and circumstances then known to him," without regard to his underlying intent or motivation in taking those actions. See *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, as we have shown, the actions of the Coast Guard officers were justified on the basis of the facts known to them. Accordingly, the requirements of the Fourth Amendment have been satisfied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981